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Intent and Recklessness in Tort: The Practical Craft of Restating Law

James A. Henderson Jr.

Cornell Law School, james-henderson@lawschool.cornell.edu

Aaron Twerski

Brooklyn Law School

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Intent and Recklessness in Tort: The Practical Craft of Restating Law

*James A. Henderson, Jr.**
*Aaron D. Twerski***

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* Frank B. Ingersoll Professor of Law, Cornell Law School.
 ** Professor of Law, Brooklyn Law School.

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INTRODUCTION

This Essay is about how *Restatements* should be conceptualized and drafted. It is not about whether they should be undertaken in the first instance;¹ nor is it about the proper role of tort in American society.² We assume that tort makes sense and that *Restatements* are helpful. Having recently served as Reporters on the *Restatement (Third) of Torts: Products Liability*,³ we want to share our thoughts on the practical craft involved in drafting such a project. We focus on the concepts of “intent” and “recklessness,” defined in sections 1 and 2 of the new *Restatement (Third) of Torts: General Principles* (Discussion Draft) (“Discussion Draft”);⁴ but we trust that our comments have broader application.

1. See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995).

2. See Marshall S. Shapo, *Changing Frontiers in Torts: Vistas For the 70's*, 22 STAN. L. REV. 330 (1970).

3. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) [hereinafter PRODUCTS LIABILITY].

4. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES §§ 1-2 (Discussion Draft Apr. 5, 1999) [hereinafter Discussion Draft].

I. CONCEPTUALIZING INTENT AND RECKLESSNESS

A. Some General Propositions Regarding Both Intent and Recklessness

However one frames the concepts of intent and recklessness in a *Restatement*, they must be kept generic, stable, and endogenous. By "generic" we mean that the concepts should not be tied to any single tort, or family of torts. For example, one frequently encounters philosophical treatments of tort that automatically link intent with the causing of tangible harms, such as personal injury and property damage.⁵ Apparently, intent and harm are coupled in this manner in order to contrast intentional infliction of harm with negligently harmful conduct.⁶ But to inextricably link intent with tangible harm in a *Restatement of Torts* would constitute error—intent has a wider range of applications in the tort system. Thus, an actor may intentionally cause another to suffer harm other than tangible harm—for example, economic loss,⁷ injury to reputation,⁸ or pure emotional upset⁹—under circumstances that make the actor's conduct tortious. Indeed, an actor may commit an intentional tort without intending any harm whatsoever.¹⁰ The definition of intent must, therefore, be kept generic so that it can help to define a wide range of different torts.¹¹ The same rule applies to recklessness. One may recklessly cause not only tangible harm to persons or property, but also economic loss, injury to reputation, and pure

5. See, e.g., JOHN FINNIS, *Intention in Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 229 (David G. Owen ed., 1995).

6. See Discussion Draft, *supra* note 4, § 1 cmt. a; see also David G. Owen, *Philosophical Foundations of Fault in Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 201 (David G. Owen, ed. 1995).

7. RESTATEMENT (SECOND) OF TORTS § 766B (1965) (discussing intentional interference with a prospective contract relation).

8. *Id.* § 580A (discussing defamation).

9. *Id.* § 46 (discussing intentionally or recklessly causes severe emotional distress).

10. For example, when A intentionally touches B in a manner that a reasonable person would find offensive, A commits an offensive battery on B even if A intends no harm, including offense, to B. See *id.* §§ 18, 19. The proper test for offensive contact is completely objective—"a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted." *Id.* § 19 cmt. a. In effect, A is held strictly liable for having acted in ignorance of prevalent social usages.

11. The Discussion Draft acknowledges that this is, to some extent, a worthwhile objective. See Discussion Draft, *supra* note 4, at Reporter's Introductory Note ("[T]he definitions of intent [and] recklessness . . . as set forth are capable of applying in cases involving all types of harms.").

emotional upset unaccompanied by personal injury or property damage.¹²

Both intent and recklessness must also be kept stable in the sense that they must have the same meaning whenever employed in defining tortious acts. The *Restatement* drafter must be able, in other words, to offer a definition that remains constant *whenever used in this Restatement*.¹³ The concept of intent is too fundamental to be allowed to shift meanings across different factual contexts. Finally, intent and recklessness must be kept endogenous to tort without adjusting for how those elements are conceptualized in nonlegal contexts or in legal contexts other than tort. Thus, the fact that in Shakespeare's tragedies "intent" may carry a special meaning that helps the playwright achieve dramatic impact,¹⁴ or the fact that "intent" has a special meaning in criminal statutes,¹⁵ should be irrelevant to the drafter of a *Restatement of Torts*. A *Restatement of Torts* speaks to, and only to, the tort system of which it is a constituent part. Other systems—Shakespearian tragedies, systems of criminal justice, and the like—should be left to conceptualize intent and recklessness on their own, perhaps quite differently.

A few further generalizations are in order. Both intent and recklessness involve subjective states of mind. Depending on the particular context, they may be coupled with objective evaluative standards,¹⁶ but a particular state of mind is always implicated.¹⁷ Moreover, while recklessness necessarily implies wrongfulness from a tort perspective, intent does not. Of course, for the causative act to be tortious, the intended consequence will more often than not be antisocial. But it need not be—one may intend consequences of one's act that are, from the actor's reasonable perspective, benign,¹⁸

12. RESTATEMENT (SECOND) OF TORTS § 46 (discussing reckless conduct causing severe emotional distress); see also *id.* § 558 (explaining that fault amounting to at least negligence is a required element of defamation claim).

13. See, e.g., *id.* § 8A ("The word 'intent' is used *throughout the Restatement of this Subject* to denote . . .") (emphasis added).

14. We made this up—although there may be something to it. Any English majors out there?

15. MODEL PENAL CODE § 1.13(12) (1962) (defining "intentionally" and "with intent," and equating intent with purpose).

16. See RESTATEMENT (SECOND) OF TORTS § 865 (interference with the right to vote or hold office "by a consciously wrongful act [that] intentionally deprives another of [that] right . . ."). Regarding recklessness, see notes 48-49, *infra*, and accompanying text.

17. Negligence requires no state of mind other than the volition necessary to commit an "act." See RESTATEMENT (SECOND) OF TORTS §§ 281-82.

18. For example, if *A* kisses *B* under the mistaken and reasonable belief that *B*, a stranger, desires what would otherwise constitute an offensive contact, *A* has committed a *prima facie*

or even socially beneficial.¹⁹ In these latter circumstances, if tort liability for the harmful consequences of the act is imposed on the actor, a form of strict liability (without fault or moral blame) will be involved.²⁰ It follows that the oft-encountered "culpability spectrum," suggesting a natural progression from negligence to recklessness to intentional tort,²¹ is neither necessarily accurate nor particularly helpful. Contrary to such a construct, some intentional torts properly involve what amounts to strict liability for the intended consequences of reasonable, well-meaning conduct.²²

Finally, it must be understood that the concept of a legal "act" logically precedes, but does not necessarily implicate, both intent and recklessness.²³ Common parlance occasionally (and erroneously) suggests that all "acts" are necessarily "intentional," and therefore actors may be said to cause, intentionally, all of the direct consequences of their acts.²⁴ To go this far, of course, robs intent of its potential for doing useful work. In other words, "all acts lead to intended consequences" is far too broad a construct. The way to avoid difficulty is to conceptualize acts as "volitional," rather than necessarily "intended,"²⁵ thereby allowing the concepts of intent and recklessness to focus on the consequences of acts, rather than on the acts themselves.²⁶ Thus, if an actor throws a rock and hits a tree, the act of throwing the rock is manifestly volitional, but it is not usefully characterized as intentional when exploring the possibility of the actor's liability for causing harm to the tree.²⁷ Whether

battery even though *A*'s conduct is reasonable under the circumstances. If *B*'s conduct constitutes a manifestation of consent, of course, *A* may be privileged. *Id.* § 892(2).

19. The same analysis in note 10, *supra*, applies when *A* touches *B* for the beneficial purpose of setting a fracture in *B*'s arm while administering unconsented-to first aid. *A* may or may not be privileged to contact *B*, but *prima facie*, *A* has committed a battery and has some explaining to do.

20. In effect, *A* has trespassed onto *B*'s person in the hypotheticals set forth in notes 10 and 19, *supra*. As a trespasser, *A* acts at his peril in the absence of a privilege.

21. *Cf. supra* note 6 and accompanying text.

22. *See supra* note 20 and accompanying text.

23. "The word 'act' is used throughout the Restatement of this Subject to denote an external manifestation of the actor's will and *does not include any of its results, even the most direct, immediate and intended.*" RESTATEMENT (SECOND) OF TORTS § 2 (emphasis added).

24. DAN DOBBS, THE LAW OF TORTS 48 (2000); *see also* Discussion Draft, *supra* note 4, § 1 cmt. e.

25. *See* RESTATEMENT (SECOND) OF TORTS § 2 cmt. a.

26. *See supra* note 23. The Discussion Draft appears to substitute "intentional act" for "volition," placing itself in the awkward position of admitting, we believe mistakenly, that intent has a role to play regarding acts, quite apart from their consequences. *See* Discussion Draft, *supra* note 4, § 1 cmt. c.

27. If the focus of attention were on the actor's liability for harming the rock by coming into contact with it in the first instance, then the act would be reaching to pick it up and the conse-

or not the *consequence* of hitting the tree is intended depends, as the next Section will explore, upon the actor's state of mind regarding that particular consequence. In any event, to assert that the actor "acted" by throwing the rocks tells us nothing about the particular consequences of that act, nor the actor's state of mind regarding those consequences.

B. Conceptualizing Intent

Assuming that a distinction has been successfully drawn between volition (part of the meaning of "act") and intent (relating to the consequences of acts); and that, properly conceived, intent is neither necessarily linked with tangible harm nor inherently wrongful; one must still identify the state(s) of mind that constitute intent on the part of an actor to cause a particular consequence of an act. Upon reflection, two (and only two) states of mind qualify. An actor intends the consequence of an act when the actor desires that consequence to follow;²⁸ and an actor intends the consequence, even if the actor does not desire the consequence, if she is aware that the consequence is certain to follow and goes ahead and acts with that awareness.²⁹

The first of these states of mind—desire—comports with the common understanding of intent and requires no elaboration.³⁰ The second—awareness—requires further discussion. Before addressing the substantive merits of this second branch of intent, a bit of housekeeping is in order. An actor may be aware of certain consequences in one of at least two senses: the actor may *know* that the consequence is certain to follow from the act; or the actor may *believe* that it will follow. The difference between these two versions of awareness—knowledge and belief—lies in their relative levels of implicit commitment to the underlying truth of the causal link be-

quence would be contact with the rock. Thus, distinguishing "act" from "consequence" is contextual and depends on the nature of the inquiry.

28. RESTATEMENT (SECOND) OF TORTS § 8A.

29. *Id.*

30. One might quibble with the precise word, if this were a matter of first impression. Indeed, the word "desire" was not used in the original *Restatement*, which relied on the concept of doing an act "for the purpose of causing" a consequence. See RESTATEMENT (FIRST) OF TORTS § 13 cmt. d (1934). The *Restatement (Second)* introduced "desire" in Section 8A; and the Discussion Draft of the *Restatement (Third)* also uses "desire" in Section 1(a). It should be noted that a defendant may desire a result without believing that it is substantially certain, or even very likely, to result. Thus A may shoot in B's direction desiring to kill him and yet, given his own sense of his lack of skills as a marksman, not believe that the bullet will strike B.

tween the act and the consequence. To say that an actor "knows" something implies that the "something" actually, or at least very probably, exists.³¹ To say that an actor "believes" something, in contrast, is more agnostic in this regard. Indeed, to say that someone "believes" something subtly signals that the "something" may exist only in the actor's mind.³² As between these two versions of awareness, "believes" is preferable to "knows" in giving content to the second branch of intent.³³

Assuming that "belief" is preferable to "knowledge" in gauging the awareness version of intent, one must then consider why courts should recognize this second branch of intent in the first place. One response may be rejected at the outset. In many, if not most, instances, proof that a rational actor believes that a consequence is certain to follow constitutes strong circumstantial proof that the actor desires the consequence to follow.³⁴ But if that were all there were to this second, belief-based branch of intent, it would not deserve to be recognized independently from desire. The law of torts already contains general rules recognizing the power of circumstantial proof,³⁵ and it is unnecessary to memorialize particular examples in the substantive black letter of a *Restatement*.³⁶ At most, a Comment regarding the efficacy of circumstantial proof would suffice, if the only relevance of belief in this context were that it constitutes circumstantial proof of desire.

31. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1064 (2d ed. 1987) (defining "know" as "1. to perceive or understand as a fact or truth; to apprehend clearly and with certainty . . .") [hereinafter RANDOM HOUSE DICTIONARY].

32. *Id.* at 190 (defining "believe" as "1. to have confidence in the truth, the existence, or the reliability of something, although without absolute proof that one is right in doing so").

33. By analogy with the privilege of self-defense, by which an actor is privileged to use force against another based on a reasonable, albeit erroneous, belief that the actor is being threatened, so here an actor should be said to "intend" a consequence when the actor believes (even unreasonably and erroneously, in this context) that the consequence is substantially certain to follow. With regard to the privilege of self-defense, the actor "gets credit," as it were, for a sincere belief that he is being threatened with force. So the actor should "take blame" when he sincerely believes a result is certain to follow. Requiring belief in the former context to be reasonable protects the victim from unwarranted acts of aggression. Abandoning reasonableness in the latter context serves the same purpose. In that setting, the actor, as an unprivileged volunteer who perceives no threat from the victim, can stay his hand and not act at all. If the actor acts with the sincere belief that a harmful consequence to the victim is substantially certain to follow, the victim deserves protection from the actor whether the actor's belief is reasonable or unreasonable.

34. DOBBS, *supra* note 24, at 48.

35. See JAMES A. HENDERSON ET AL., THE TORTS PROCESS 108-10 (5th ed. 1999).

36. The major exception is *res ipsa loquitur*. See RESTATEMENT (SECOND) OF TORTS § 328D (1965).

As one might suspect, however, that is *not* all there is to the belief-based branch of intent. At least two factual circumstances support the conclusion that an actor who *believes* that a consequence is substantially certain to follow nevertheless does not necessarily subjectively desire that consequence to occur. The first involves an actor whose act is certain to cause two or more consequences, only one of which the actor desires to occur. Some observers refer to this circumstance as involving "double effect" and debate whether the actor should be said to "intend" the undesired consequence.³⁷ In the clearest example of double effect, the actor very much regrets the undesired consequence, but proceeds nevertheless because the benefits to the actor of effecting the desired consequence outweigh the actor's regret regarding the undesired consequence. In essence, the actor believes that accomplishing the one necessitates causing the other. For tort purposes, at least, the actor should be said to intend the undesired consequence that is substantially certain to follow from the actor's act.³⁸

The second factual circumstance in which an actor may believe that a consequence is certain to follow from an act, but nevertheless not subjectively desire that result, involves a breakdown in thought processes brought on by mental disability. A very young child, for example, or a mentally deficient adult, may act believing that a consequence is certain to follow and nevertheless lack the desire to achieve that consequence.³⁹ (Such actors are not able, in common parlance, "to put two and two together.") The interesting question from the tort perspective is whether such an actor should be held to intend the consequence. If a finding of intent brings tort liability, that liability will be "strict" in the full sense of the word. If such strict liability is unattractive, the *really* interesting question is whether occasional instances of undesirable strict liability are more than offset by the more frequent and more clearly appropriate imposition of liability in our earlier example of double effect. As-

37. See Phillippa Foot, *The Problem of Abortion and the Doctrine of Double Effect*, 5 OXFORD REV. 5 (1967) (explaining the double effect doctrine and criticizing its application to the abortion question).

38. Indeed, given the real or perceived constraints on the alternatives available to the actor, the actor may be said actually to "desire" the seemingly unintended consequence in the sense that the actor prefers to cause it rather than to avoid causing it by refraining from acting. Thus, the position "I wish I didn't have to cause this second consequence" could always be followed by the statement "But given existing constraints, I prefer (desire) to cause that consequence rather than not to act at all."

39. The best-known example is probably *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955) (holding that a five year-old boy "intended" a consequence that the trier of fact found that he did not desire to occur).

suming that any attempt in the black letter to distinguish between the two forms of belief-based intent—double effect and mental breakdown—will prove futile,⁴⁰ the best approach is probably for the black letter to recognize belief-based intent in generic terms that include both double effect and mental breakdown, and then to recognize in the Comments the problems posed by instances of mental breakdown.⁴¹

One further issue regarding the conceptualization of intent remains to be considered. Earlier we distinguished between the volition inherent in the concept of “act” and the intent that actors often possess regarding the consequences of their acts.⁴² One must still distinguish between the proximate consequences of discrete acts, on the one hand, and the inevitable consequences of general courses of conduct, on the other. The problem at issue is similar to the one eliminated by refusing to treat all consequences of acts as inherently intended. Here the focus is not on the relationship between “intent” and “act” but instead on the relationship between “act” and “consequence.” Two recurring factual circumstances must be excluded from what is meant by “the consequences of an act,” lest the concept of “intended consequences” once again be cast too broadly. Whenever an actor undertakes a course of repetitious conduct—for example, batting in the lineup for a major league baseball club throughout a long season—some types of unhappy consequences are, sooner or later, virtually certain to occur. For a batter in the major leagues, hitting foul balls into the stands, thereby striking patrons, is certain to occur from time to time across many thousands of swings of a bat.⁴³ Yet, in connection with any given swing, not only does the batter not desire to hit a foul ball when he swings the bat, he does not believe that such a consequence is certain—or even very likely—to follow. The player understands at the outset of the baseball season that foul balls will inevitably occur; but the “act” referred to in the phrase “one intends the consequence of an act” is the discrete act of swinging a bat at a pitched ball, not the deliberate undertaking of the course of conduct involved in bat-

40. Even five year-olds, as in *Garratt*, *supra* note 39, can desire to harm others. To open the door—even a crack—to arguments that “I believed harm was substantially certain, but I didn’t really *desire* it” would threaten to devour the sensible liability rule covering double effect.

41. A Comment could indicate that, in extreme instances where the argument against liability is especially compelling, the court could rule—or the jury find—that the requisite belief was absent.

42. See *supra* note 23 and accompanying text.

43. As used here, “striking” includes impacting the hands of a patron attempting to catch a foul ball.

ting regularly in a major-league lineup. Properly conceptualized, intent focuses on discrete acts, not general courses of conduct.⁴⁴

The other problematic fact pattern in connection with repetitious activity is similar to the first in that it threatens automatically and counterproductively to convert clearly unintended consequences into consequences intended in the belief-with-certainty sense. In these cases, the requirement of a discrete act (rather than a prolonged, repetitive course of conduct by the defendant actor) is satisfied, but the consequence in question is certain to follow only in the sense that it is inevitable in light of a repetitive course of conduct by outside agents interacting with a continuing and dangerous circumstance created by the defendant's discrete act. For example, suppose that an employer permanently removes a safety feature from a machine at a workplace, in order to increase the machine's productivity, without any subjective desire to harm anyone by such removal. Permanent removal of the safety feature creates a virtual certainty that, sooner or later, a worker will suffer the type of injury that the safety feature would have prevented. The employer has performed a discrete act of removal—it is akin to a single swing of a bat, rather than batting in the lineup for the season. Yet, because injury is neither desired nor substantially certain to result from any given worker's interaction at any given moment with the unprotected machine, the injury should be held to be no more intended by the employer than is the foul ball struck by our

44. See DOBBS, *supra* note 24, at 48; see also RESTATEMENT (SECOND) OF TORTS § 8A (1965). Some have argued that strict liability for defectively manufactured products is supported by an intent rationale. That is, manufacturers who distribute hundreds of thousands of units know that their quality control is not perfect and thus some small number of units will be defective and cause injury. They are thus considered to intend the injuries. See, e.g., Thomas A. Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077, 1087-92 (1965); Paul A. LeBel, *Intent and Recklessness as Bases of Products Liability: One Step Back, Two Steps Forward*, 32 ALA. L. REV. 31, 67 (1980). Given the view set forth in the text, intent would not support liability for products liability. The undertaking of general conduct of selling products that ultimately will cause harm to someone, is too broad and unfocused to support liability based on intent. In the context of manufacturing defects, reliance on intent as a policy reason to support liability, though erroneous, is essentially harmless. Liability for such defects is truly strict. In the case of generic defects, the idea that intent should be grounds for imposing liability is not benign. The overwhelming majority of generic defect cases are based on "conscious design" choices made by manufacturers. The issue is not whether the defendant acted with knowledge to substantial certainty that the product would cause harm to some persons. It is inevitable that reasonably designed products will cause injury. Risk-utility balancing presupposes that well-designed products carry with them risks. Indeed, LeBel, *supra*, at 45-49, recognizes that intent standing alone cannot serve as a predicate for liability. He nonetheless suggests that proceeding under an intent cause of action (with a risk-utility defense) would benefit plaintiffs. For the reasons set forth in the text, we disagree.

hypothetical batter.⁴⁵ The way out of this conceptual difficulty is to insist that, for a consequence to be intended in the "belief with certainty" sense, not only must the act producing the consequence be discrete, but the consequence complained of must result directly and proximately (both temporally and spatially) from the act.⁴⁶

C. Conceptualizing Recklessness

As we have seen, intent involves subjective states of mind—desire and belief—that have no necessary connection with wrongdoing. One may intend to cause a benign, or even a beneficial, consequence.⁴⁷ In contrast, recklessness presents more of a mixed bag. Recklessness has both a subjective component (awareness that one is creating a serious and relatively easily avoidable risk of harm to others) and an objective component (one's conduct, assessed objectively, must be negligent).⁴⁸ (Recklessness may be said to be "negligence with an attitude.") Knowledge, rather than belief, is the appropriate form of awareness in this context, given the requirement that the actor's conduct must actually, not merely apparently, create a risk of injury to others. And the actor's knowledge must relate not only to the seriousness of the risks created but also to the relative ease with which those risks might be reduced or eliminated. This latter element supports the conclusion that the reckless actor is callously indifferent to the welfare of others.⁴⁹

This last observation presents an issue similar to one posed in the preceding discussion of belief-based intent: If an actor knows that the risk created is both substantial and easily avoided, is such

45. The fact pattern described in the text recurs in the context of injured workers bringing intentional tort claims against their employers for maintaining unsafe work premises. *E.g.*, *Holtz v. Schott Pattern Works Co.*, 626 N.E.2d 1029 (Ohio 1993). See generally ARTHUR LARSON, 6 LARSON'S WORKERS' COMPENSATION LAW §§ 103.03-.05 (2000). The court in *Holtz v. Schott Pattern Works Co.* found that permanent removal of a safety guard raised a question of fact as to whether the employer had acted with the intent to cause harm and thus was stripped of the immunity of worker's compensation. Whether the offensive conduct warrants depriving the employer of the immunity of workers' compensation is beyond the scope of this Article. We note only that the conduct of the employer is not intentional within the meaning of the classic tort definition of intent.

46. See DOBBS, *supra* note 24, at 48.

47. See *supra* notes 18-19 and accompanying text.

48. See, *e.g.*, RESTATEMENT (SECOND) OF TORTS § 500.

49. Interestingly, Section 500 of the *Restatement (Second)* speaks ambiguously of the negligent actor knowing or having reason to know "that such risk is substantially greater than that which is necessary to make his conduct negligent." If one holds constant the burden of available precautions to avoid injury, then this seems to be saying that the actor must know not only that the risk exceeds the burden, (i.e. the actor is negligent), but that the risk substantially exceeds it—i.e. that the burden of precautions is low relative to the risk.

knowledge *itself* the legal equivalent of callous indifference, or must the actor's state of mind subjectively include such indifference? The test case, of course, would be the actor whose mental incapacities prevent her from processing the relevant knowledge of risk to the point of actually arriving at a mental state that includes deplorable indifference toward the safety of others. Given that the concept of recklessness, in contrast to intent, necessarily connotes wrongdoing, the sort of strict liability involved in holding some very young, or otherwise incapacitated, actors responsible for "intentionally" causing undesired consequences is inappropriate in this context.⁵⁰ It follows that for recklessness to be present, the actor must not only know that the risk is great and easily avoidable, but she also must subjectively entertain callous indifference to the plight of would-be victims.⁵¹

Thus far, we have spoken of recklessness in connection with acts that cause tangible harm. Courts talk that way,⁵² and the *Restatement (Second) of Torts* talks that way in its formal definition of recklessness.⁵³ Yet, it will be recalled that we advised against so limiting the concept of intent because that concept has an additional role to play in defining tortious conduct causing purely intangible losses (economic loss, emotional upset, and injury to reputation).⁵⁴ Is recklessness similar to intent in this regard? Putting the question differently, can one imagine instances in which conduct may be said to be reckless because the actor thereby manifests callous indifference toward the nonphysical well-being of others? We submit that such instances are easily conjured—an actor may recklessly cause emotional upset,⁵⁵ or injury to reputation, or economic loss. Indeed, the *Restatement (Second) of Torts* employs the

50. Because intent does not necessarily connote wrongdoing, *see supra* notes 18-19, imposing strict liability on mentally incapacitated actors is arguably appropriate, *see supra* notes 40-41. Strict liability, however, would clearly be inappropriate in connection with allegedly reckless conduct. "No-fault recklessness," in other words, is an oxymoron.

51. In most cases, of course, callous indifference would be inferred factually (rather than merely legally) from the element of knowledge.

52. *See, e.g., Piacuba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1285 (11th Cir. 1999).

53. *See* RESTATEMENT (SECOND) OF TORTS § 500.

54. *See supra* notes 7-9 and accompanying text.

55. In *Garland v. Herrin*, 724 F.2d 16 (2d Cir. 1983), the court was faced with an action brought by parents of a girl who, while the parents were asleep in their bedroom, was bludgeoned to death by her boyfriend in one of the other bedrooms of the house. Defendant conceded that he "recklessly" caused the plaintiffs severe emotional distress but denied he had done so "intentionally." On appeal, the Second Circuit found no authority that New York would allow for a cause of action based on reckless infliction of severe emotional distress. The court recognized that Section 46(1) of the *Restatement (Second)* broadened the tort to include recklessness but declined to accept the *Restatement's* position as reflective of the law of New York.

recklessness concept in several such contexts notwithstanding the fact that its formal definition of recklessness is tied to tangible harm.⁵⁶

II. CHOOSING APPROPRIATE RESTATEMENT LANGUAGE TO EXPRESS THESE CONCEPTUALIZATIONS OF INTENT AND RECKLESSNESS

A. A Short Primer of Do's and Don't's for Drafting Restatement Black Letter

Literature abounds explaining legal draftsmanship. Books and articles are available offering guidance in drafting all varieties of business agreements,⁵⁷ donative instruments,⁵⁸ legislation,⁵⁹ legal memoranda,⁶⁰ and judicial opinions.⁶¹ To our knowledge, however, published guidance for drafting *Restatements* is not to be found. Perhaps the demand for such guidance is all but nonexistent. Or perhaps would-be authors—retired *Restatement* Reporters—are too jaded, or too pooped, to make the effort.⁶² For better or worse, we now undertake to fill this gaping void.

1. The *Restatement* Drafter Should Strive to Be Concise—All Things Equal, the Fewer Words in the Black Letter and Comments, the Better

This might seem obvious, but it is often forgotten. Many, if not most, *Restatement* Reporters are legal academics whose in-

56. See RESTATEMENT (SECOND) OF TORTS § 500.

57. See, e.g., Barbara Child, *The Study of Contract Drafting Strategy: Exercises in Mine Detection*, 42 J. LEGAL EDUC. 279 (1992); James W. Martin, *Tips for Writing the Contract that Stays Out of Court (with forms)*, PRAC. REAL EST. LAW., May 1998, at 55.

58. See Ted Ellinghaus et al., *Common Problems in Will Drafting*, 68 L. INST. J. 35 (1994); see also Gerry W. Beyer, *Drafting in Contemplation of Will Contests*, PRAC. LAW., Jan. 1992, at 61.

59. See William D. Warren, *UCC Drafting: Method and Message*, 26 LOY. L.A. L. REV. 811 (1993).

60. See Roland A. Paul, *An Easy Way to Write Good Legal Memos*, PRAC. LAW., Sept. 1990, at 27.

61. See George Leggett, *Judicial Writing: An Observation by a Teacher of Writing*, 6 SCRIBES J. LEGAL WRITING 137 (1996-1997).

62. We confess that our five-year-plus stint as Reporters on the products liability project leaves us neither jaded nor pooped. As we have acknowledged publicly, "Drafting the Restatement has been an exhilarating experience." James A. Henderson & Aaron D. Twerski, *Arriving at Reasonable Alternative Design: The Reporters' Travelogue*, 30 U. MICH. J. L. REFORM 563, 588 (1997).

instincts, encouraged by law review writing, run toward long-windedness.⁶³ It took us several years working on the products liability project to appreciate the value of conciseness. Even toward the end, when we thought we had a super-tight draft, helpful critics found ways to save words. Legal archaeologists who bother to look will observe this principle reflected in the sequences of preliminary drafts of the products liability project published and circulated for discussion and revision.⁶⁴ Several important black letter provisions of our project, such as those dealing with inferences of defect⁶⁵ and economic loss⁶⁶, illustrate this point dramatically. Of course, there is such a thing as too much conciseness—the goal here is optimality.⁶⁷

2. The Drafter Should Avoid Introducing Empty Terms of Art

An “empty term of art” is a term that has no meaning other than a formal definition expressed in one, or a very few, plain words. Suppose that the process of conceptualization described earlier were to reveal that a proper principle of tort is that one who kicks another person commits a tort. Let us further assume that the person framing the relevant discourse is tempted to substitute “poo-poo” as the operative verb, so that the principle would be “one who poo-poo’s another commits a tort,” making clear that “poo-poo’s” invariably means “kicks.” The principle here invoked would urge that the empty term “poo-poo” be avoided and that the rule be expressed simply as “one who kicks another commits a tort.”⁶⁸ The principle retains power even when the term of art has two meanings. For example, if “poo-poo” means “kicks or punches,” the drafter should consider substituting those terms for the empty term of art. Countervailing considerations include whether the term of art provides an easy, short-hand way of expressing one or more re-

63. Of the seven *Restatement* projects underway in 1999, all of the Reporters were law professors, along with all three Associate Reporters. See AMERICAN LAW INSTITUTE AND THE AMERICAN LAW INSTITUTE/AMERICAN BAR ASSOCIATION COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, DIRECTORY (1999).

64. The ALI maintains archives containing all published drafts, circulated proposed amendments, votes at annual meetings, and the like. We donated all our papers, rough drafts with marginal commentary, and the like in connection with the *Products Liability Restatement*. They are housed at the University of Pennsylvania Law School library.

65. See PRODUCTS LIABILITY, *supra* note 3, § 3.

66. See *id.* § 21.

67. Cf. Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974).

68. Cf. Alf Ross, *Tû-Tû*, 70 HARV. L. REV. 812 (1957).

curing concepts that require many more words to define;⁶⁹ whether the term of art carries meaning of its own that is helpful when filling in gaps in the underlying concept;⁷⁰ or whether the term of art has a long tradition and is deeply ingrained in the language of tort.⁷¹ A particularly interesting story in this regard involves judicial reliance on the term "malice" in connection with the first-amendment privilege in defamation law.⁷²

3. The Drafter Should Avoid Introducing New Terminology Unless a Radical Break with Tradition is Called For

This principle is closely related to the empty-term principle. Quite simply, *Restatement* drafters should draw on prevailing wisdom from the past when they set about to express legal concepts in words. Drafters who are academics must work especially hard to remember that they are not writing a law review article—or a statute, for that matter. Relating the black letter to new ways of talking about tort should be left to the Comments or, better yet, the Reporter's Notes. Radical departures from tradition are rarely justified in a *Restatement*. When the situation arises, new terminology may be appropriate; but it should be used with great caution.

4. The Drafter Should Define Workhorse Terminology

"Workhorse terminology" connotes important, linchpin terms upon which a *Restatement* relies heavily and whose meaning may not be self-evident. The required definitions may be included in operative black letter provisions or in separate definitional sections. At the very least, the Comments should flesh out the meanings of technical terms that arguably do not require formal definition in

69. The term "intent," itself, is a good example. One could insert the content of Section 8A of the *Restatement (Second) of Torts* in place of "intent" every place the latter term is employed; but doing so would be unwieldy.

70. A clear example in the Discussion Draft is Section 7, dealing with emergency. "Unexpected emergency" is defined as "an unexpected situation requiring rapid response." But since the word "emergency" presumably carries meaning of its own, the related concepts of "unexpectedness" and "rapid response" are employed parenthetically. Query: Is the term "unexpected emergency" redundant?

71. "Intent" retains its independent vitality, in part, for this reason.

72. See *Masson v. New Yorker Mag.*, 501 U.S. 496, 510 (1991) ("Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or motive arising from spite or ill will."); see also *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989) ("It also is worth emphasizing that the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term."); *Westmoreland v. CBS Inc.*, 596 F. Supp. 1170, 1172 (S.D.N.Y. 1984) (" 'Malice' in this context does not carry its dictionary definition: it is a word of art . . . ").

the black letter. We confess to having violated this principle, quite self-consciously, in at least one instance in the products liability *Restatement*.⁷³

5. In Connection with Definitions, the Drafter Should Define the Term Used in the Black Letter

If the black letter uses the verb "intend," one should not define the noun "intent" unless that term is also used in the black letter. The same applies for the adjective, "intentional."

6. The Drafter Should Avoid the Gratuitous Use of Synonyms

Most of us were taught that using synonyms is a sign of good writing and that *Roget's Thesaurus* is our best friend. Quite the opposite is true of technical legal writing, especially in connection with *Restatement* drafting. Pairs of words and phrases like "believe" and "know," "harm" and "injury," "causes" and "brings about," and "acting" and "engaging in conduct" might very well be adequate substitutes for one another but they should not be used interchangeably in a *Restatement*.⁷⁴ In the context of a *Restatement*, Gertrude Stein got it right: "A rose is a rose is a rose."

7. The Drafter Should Limit the Meanings of Technical Terms to the Project at Hand

The drafter of a *Restatement of Torts* should not define technical terms differently than they would otherwise be defined for tort purposes simply to allow such definitions to serve in other (albeit related) nontort legal contexts. The tort system must relate intelligently with other subsystems within the larger legal system. But little, if anything, is to be gained—and much may be sacrificed—when constituent conceptual elements of the tort system are modified so that they can do service in other legal subsystems.⁷⁵

73. See PRODUCTS LIABILITY, *supra* note 3, § 8(c), wherein the term "remanufactured" is used but never defined or even discussed.

74. Interestingly, three of these four sets of terms are used interchangeably in the Discussion Draft. See *infra* notes 95-96, 110 and accompanying text.

75. See *supra* note 15 and accompanying text.

B. Some Comments on Comments

Unlike Reporters' Notes, which are unofficial and for which only the Reporters are responsible, Comments are part of the Institute's official work-product. Substantively, they serve to flesh out and clarify the meaning of the black letter. They also may supply the historical antecedents of the black letter⁷⁶ and place the black letter in the context of the purposes sought to be achieved.⁷⁷ In theory, at least, Comments should not do the work of black-letter provisions; they should not introduce rules or standards of decision not contained in the black letter, nor should they modify the substance of the black letter significantly. When a proposed final draft of a *Restatement* contains Comments that appear to carry too much substantive freight, the odds are very great that the substantive messages of those Comments are the result of compromise. In these situations, provisions, urged by a substantial number of Institute members to be included in the black letter, were relegated to the Comments. Although this is, as a general rule, inappropriate, some critics believe that our own *Restatement* succumbed to it in at least one instance.⁷⁸

As for the mode of expression to be used in the Comments, the same standards urged earlier for the black letter apply here. Drafters are sorely tempted, having toed the line with the black letter, to revert to law review style in the Comments. Synonyms creep into the discourse; new terminology gets casually introduced; discussions of policy objectives are treated as though they come from Mount Olympus.⁷⁹ All of these tendencies should be resisted.

76. In the products liability project we included Comments entitled "History" to serve this purpose. See, e.g., *PRODUCT LIABILITY*, *supra* note 3, § 1 cmt. a.

77. In the products liability project we included Comments entitled "Rationale" to serve this purpose. See, e.g., *id.* § 2 cmt. a.

78. See *id.* § 2, cmt. e. This came to be known as the "Habush amendment," after a prominent Milwaukee plaintiffs lawyer who urged its inclusion as an amendment to the black letter of section 2. The reason that the Reporters sought to place Comment *e* in the footnotes rather than in the black letter, is that courts rarely declare product categories to be defective—courts refuse to impose "category liability." The comment allows that in rare instances there may be occasion to do so, but it stops short of endorsing the idea. To have elevated the comment into the black letter would have made it appear that category liability is a staple of products liability law. Instead, we thought to convey the impression that only in the rarest of cases would the comment come into play.

79. We solved this problem in our products liability project by putting the words in the mouths of nameless courts and commentators. See, e.g., *id.* § 2 cmt. a ("Strict liability . . . is generally believed to foster several objectives.").

The drafter's success in this regard depends considerably on those assisting the drafting process.⁸⁰

C. Comments on Illustrations

As noted earlier, Illustrations help clarify the meaning of the black letter and Comments. Frequently they are based on published decisions, which are cited in the Reporters' Notes.⁸¹ To serve their purpose, Illustrations must reach outcomes that seem preordained once the relevant substantive provision is properly understood. Fact patterns in so-called "gray areas," at the edge of a substantive provision's meaning, should not be employed in Illustrations.⁸² If the black letter is ambiguous or uncertain, either the black letter or Comments should be modified to clear up the ambiguity or uncertainty, or the issue should be left for courts to resolve over time.

D. A Brief Sketch of How a Restatement of Torts Should—And Should Not—Define Intent and Recklessness, Using the Second Restatement as a Starting Place

1. The Definition of Intent

The definition of intent in section 8A of the *Restatement (Second) of Torts* meets the criteria set forth above and requires little, if any, tinkering: The word "intent" is used throughout the *Restatement* of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.⁸³ This definition purports to be generic—it is not tied to the causing of tangible harm, nor to any single tort, or family of torts.⁸⁴ It is stable in that it carries the same meaning "throughout the *Restatement*." And it purports to be endogenous in its pointed reference to "the *Restatement of this Subject*," and makes no reference in the comments to other legal areas in which "intent" is used. Section 8A reflects the two main

80. As our Preface indicates, *id.* at xvii, we received help from many sources. One Adviser, in particular, stands out in connection with curbing our tendency to treat social policies as undebatable truths: Justice Hans A. Linde, of Oregon.

81. See, e.g., PRODUCTS LIABILITY, *supra* note 3, § 2 Reporters' Note.

82. Classroom hypotheticals in law school are often intended to confound; *Restatement Illustrations* should always be aimed at clarifying.

83. RESTATEMENT (SECOND) OF TORTS § 8A (1965).

84. The term is used in no fewer than twenty-one sections of the *Restatement (Second)*.

branches of intent, discussed earlier, and adopts the preferred concepts and terminology: “desires” and “believes.” Moreover, section 8A properly focuses on the causal relation between the “act” and its “consequences.” And in connection with the belief-based branch of intent, it avoids reference to “conduct” or “activity” and focuses squarely on “the [specific] consequences [that the actor believes] are substantially certain to result from [the specific act in question.]”⁸⁵ Affirming the adage, “If it ain’t broke, don’t fix it,” we see nothing to be gained in changing this black-letter definition in the proposed new *Restatement*, except, of course, to eliminate the masculine pronouns.⁸⁶

2. The Definition of Recklessness

The treatment of recklessness in the *Restatement (Second)* is a different story from that of intent. Although the concept is relied upon in a number of black-letter provisions,⁸⁷ the only general definition appears in Section 500, entitled “Reckless Disregard of Safety Defined”:

The actor’s conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.⁸⁸

This definition is problematic in several important respects. Referring to “physical harm to another,” the definition on its face is not generic as that term is used in this Essay.⁸⁹ The reference to “does an act or intentionally fails to do an act” is clumsy and redundant—“acts or fails to act” would have sufficed. And why does the *Restatement (Second’s)* definition make no explicit reference to the actor’s knowledge regarding the relative ease (low cost) with which the risk could be avoided? As it stands, the definition appears to embrace what could be described as “self-conscious gross negligence.” It will be recalled that the “bad attitude” on which the con-

85. RESTATEMENT (SECOND) OF TORTS § 8A; see *supra* note 84.

86. As is obvious to all, the earlier *Restatements* reflect a by-gone era in this regard. Needless to say, the *Products Liability Restatement* contains not a single such gender-specific reference, except in Illustrations where an actor’s gender is clearly revealed by the name assigned to that actor.

87. Reckless disregard and its variations appear in no fewer than eight sections of the *Restatement (Second)*.

88. RESTATEMENT (SECOND) OF TORTS § 500.

89. See *supra* note 11 and accompanying text.

cept of recklessness—or, even more so, “reckless disregard”—rests is callousness so depraved that the actor knows not only that the act is highly risky but also that it is *gratuitously* risky in the sense that the actor could easily (at low cost) reduce or avoid the risk of harm to others.⁹⁰ Without this dimension of self-conscious gratuitousness, the *Restatement (Second)*’s definition of “reckless disregard” seems insufficient. Of course, if the phrase “substantially greater than that which is necessary to make his conduct negligent” is read to refer to the extent to which the magnitude of the risk exceeds the burden of precaution, then by implication the actor knows that the cost of avoiding the risk is relatively low. But we would prefer that point to be made explicitly.

III. CONSTRUCTIVE CRITICISM OF THE DISCUSSION DRAFT’S DEFINITIONS OF INTENT AND RECKLESSNESS

Before offering constructive criticism, we offer a heartfelt disclaimer. The language we are about to examine is contained in a Discussion Draft that is manifestly intended to encourage just that—discussion. With this disclaimer in mind, and with the hope of improving the end-product, we offer the following suggestions.

A. *The Discussion Draft’s Definition of Intent*

The Discussion Draft defines the concept of intent in Section 1 of Chapter 1:

INTENT AND RECKLESSNESS: DEFINITIONS

§ 1. Intentional

An actor’s causation of harm is intentional if the actor brings about that harm either purposefully or knowingly.

(a) Purpose. An actor purposefully causes harm by acting with the desire to bring about that harm.

(b) Knowledge. An actor knowingly causes harm by engaging in conduct believing that harm is substantially certain to result.⁹¹

First, the draft reflects the basic structure of intent. Section 1 recognizes the two branches, and adopts “desire” and “believing”

90. See *supra* note 49 and accompanying text.

91. Discussion Draft, *supra* note 4, § 1.

as the operative terminology for each. Having said that, we have problems with section 1. The first thing that strikes the eye is the fact that Chapter 1 is entitled "Intent and Recklessness: Definitions." And yet, the first term defined is the adjective, "intentional," not the noun, "intent." (Similarly, the second term, defined in section 2, is "reckless," not "recklessness.")⁹² In any event, the definition of "intentional" begins by linking the concept of intent to causation of harm, thereby eliminating the opportunity for the definition of intent to be generic to the same extent as in the *Restatement (Second)*.⁹³ More importantly, linking intent with harm connotes that intentional torts are necessarily wrongful in a moral sense—that indeed, it suggests that intentional torts are necessarily more wrongful than are torts involving recklessness. Linking the concept of intent to wrongfulness in this manner overlooks the role that intent properly plays in defining instances of strict liability without fault.⁹⁴

The terminology of intent, as well as the substance, is also confused in this discussion draft. For example, section 1 substitutes "brings about" for "causes" in the preamble.⁹⁵ Then it switches to "causes" and then back to "brings about" in subsection (a).⁹⁶ And then it switches back to "causes" in subsection (b).⁹⁷ Moreover, subsection (a) speaks of the actor "acting," whereas subsection (b) speaks of the actor "engaging in conduct."⁹⁸ As we observed in an earlier discussion, "acting" is different from "engaging in conduct,"⁹⁹ and the draft uses the latter term in precisely the context wherein it does maximum mischief—the context of an actor intending a consequence by believing that the consequence is substantially certain to follow.¹⁰⁰

When the draft splits intent into its two branches, it introduces a new (at least to torts mavens) term: "purposefully."¹⁰¹ According to the Comments, "purposefully" is borrowed from the Model Penal Code.¹⁰² As we explained earlier, this sort of borrowing

92. *Id.* § 2.

93. *See supra* note 85 and accompanying text.

94. *See* Discussion Draft, *supra* note 4, § 2 cmt. a.

95. *Id.* § 1.

96. *Id.* § 1(a).

97. *Id.* § 1(b).

98. *Id.*

99. *See supra* note 44 and accompanying text.

100. Discussion Draft, *supra* note 4, § 1 cmt. b.

101. *See id.* § 1.

102. *Id.* § 1 cmt. b.

from other systems is almost always a mistake.¹⁰³ There is no reason for the *Restatement of Torts* to utilize the same terminology as does criminal law. And even if such borrowing is useful, the tort *Restatement* drafter should at least borrow the term actually used elsewhere—the Model Penal Code uses “purposely,” not “purposefully,”¹⁰⁴ and the two words have somewhat different meanings.¹⁰⁵ If this were not confusing enough, Section 1 of the Discussion Draft introduces “purposefully” in the preamble language and then defines the term “purpose” in subsection (a).¹⁰⁶ Section 1 exclusively defines “purposefully” as “the desire to bring about the harm.”¹⁰⁷ As drafted, the term “purposefully” is what we earlier referred to as “an empty term of art.”¹⁰⁸ That is, one could simply substitute the concept of desire for that of purposefulness without making any change in substance.¹⁰⁹ “Purposefully” appears to have been introduced solely for the dubious purpose of linking section 1 with the Model Penal Code.¹¹⁰

The Discussion Draft’s treatment of the “believing with substantial certainty” branch of intent, set out in subsection 1(b), is no less problematic. The preamble refers to “knowingly” yet the term defined in subsection (b) is “knowledge.” More importantly, subsection (b) speaks of an actor “engaging in conduct,” rather than “acting.” As we explained in an earlier discussion, employing the concept of engaging in conduct suggests that general courses of conduct, deliberately engaged in, necessarily lead to intended consequences. A general course of conduct might readily include playing major league baseball or maintaining an inherently dangerous workplace; yet, in neither example are foul balls or injured workers necessarily “intended.” Section 1 of the Discussion Draft of the new *Restatement* struggles in the Comments to overcome the difficulties presented by “engages in conduct,”¹¹¹ but the need to explain would be greatly reduced by use of the concept of “*acting* with the belief that a consequence is substantially certain to result *from that act*.”

103. See *supra* Part I.A.

104. MODEL PENAL CODE § 1.13(2) (1962).

105. In the *Random House Dictionary of the English Language*, the meaning of “purposeful” includes “determined” and “purposely” includes “deliberately.” RANDOM HOUSE DICTIONARY, *supra* note 31, at 1570.

106. Discussion Draft, *supra* note 4, § 1(a).

107. *Id.*

108. See *supra* Part III.A.1.

109. The draft could simply read “An actor’s causation of harm is intentional if the actor desires to bring about that harm . . .”

110. See Discussion Draft, *supra* note 4, § 1.

111. See *id.* § 1 cmts. c & d.

In parallel fashion to the introduction of the empty term “purposefully” in connection with desire-based intent, section 1 introduces “knowledge” as an empty term in connection with belief-based intent. Given that knowing is always believing in this draft,¹¹² “knowingly” and “knowledge” could just as well be “poo-poo.”¹¹³ But here the use of “knowledge” as an empty term is more than simply whimsical, inasmuch as “knowledge” is the chief historical rival of “belief” in this context. As explained earlier, the two terms have different meanings that should preclude their employment as synonyms.¹¹⁴

B. The Discussion Draft's Definition of Recklessness

The Discussion Draft defines the concept of recklessness in Section 2:

§ 2. Reckless

An actor's conduct is reckless if:

(a) the actor knows of the risk of harm created by the actor's conduct, or knows facts that make that risk obvious to anyone in the actor's situation, and

(b) the precaution that would eliminate or reduce that risk involves burdens that are so slight relative to the magnitude of the risk as to render the actor's failure to adopt the precaution a demonstration of the actor's indifference to the risk.¹¹⁵

Substantively, Section 2 constitutes an improvement over Section 500 of the *Restatement (Second)*.¹¹⁶ Rather than have the “depraved indifference” element rest on the actor's knowledge of the unusual magnitude of the risks, measured absolutely, the draft relies on the actor's awareness of the relative ease with which those risks can be eliminated. The draft does not speak of the actor's “awareness,” but the ease of elimination must constitute “a demonstration of the actor's [presumably actual] indifference to the risk.”¹¹⁷ Thus, on the critical issue of the actor's state of mind, the draft properly focuses on the relative ease with which the risk could be eliminated rather than on the absolute magnitude of the risk—presumably, even a relatively smallish risk that materializes in harm can support a

112. See *supra* note 107.

113. Cf. *supra* note 68 and accompanying text.

114. Cf. *supra* notes 31-32 and accompanying text.

115. Discussion Draft, *supra* note 4, § 2.

116. See RESTATEMENT (SECOND) OF TORTS § 500 (1965).

117. Discussion Draft, *supra* note 4, § 2(b).

finding of recklessness if the actor knows that the risk can be eliminated at much less cost and goes ahead and acts with conscious indifference to the risk being thereby gratuitously created. While this position may be conceptually sound, one wonders whether the creation of small risks, even if knowingly gratuitous, justifies being labeled "reckless." In this connection, it might be appropriate to impose a minimal threshold on the magnitude of the risk required for the actor to be reckless—perhaps modify "magnitude" in subsection (b) with "significant," and then explain in a Comment.

CONCLUSION

On balance, this Discussion Draft's treatment of recklessness is better than its treatment of intent. With regard to intent, the definition should be generic—not tied to causing harm nor, by implication, to the idea of wrongfulness. The *Restatement (Second)*'s treatment of intent should be continued more or less intact. With respect to recklessness, the shift of focus from the absolute magnitude of the risk knowingly created by the defendant's act to the actor's awareness of the relative ease with which the risk could be avoided constitutes a real improvement. Regarding both definitions, greater attention should be given to identifying precisely the terms being defined, to eliminating empty terms of art, and to avoiding the confusing use of synonyms.